TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1904.

No. ~~371~~. 94.

THE UNITED STATES, APPELLANT,

vs.

CHARLES M. THOMAS.

No. ~~375~~. 95.

CHARLES M. THOMAS, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED JULY 26, 1904.

(19025 AND 19026.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 374.

THE UNITED STATES, APPELLANT,

vs.

CHARLES M. THOMAS.

No. 375.

CHARLES M. THOMAS, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Caption	1	1
Petition filed	1	1
Amended petition	1	1
Traverse	8	5
Findings of fact	9	6
Conclusions of law	11	10
Opinion	12	10
Dissenting opinion	19	18
Order for judgment	21	21
Motion for new trial	22	22
Opinion on motion for new trial	23	22
Judgment	25	25
Application of defendant for appeal	26	25
Order allowing appeal	26	25
Clerk's certificate to transcript on appeal	27	26
Clerk's certificate to application for and allowance of cross appeal	28	26
Application of claimant for appeal	29	26
Order allowing cross appeal	29	26

Court of Claims.

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

I. *Petition and amended petition.*

original petition of the claimant was filed November 29, 1901. January 17, 1902, the claimant, by leave of court, filed his amended n in lieu of his said original petition, which is as follows:

Amended petition.

d January 17, 1902, in lieu of original petition filed November 29, 1901.

honorable the Court of Claims:

claimant respectfully represents:

hat he is a captain in the United States Navy, having been com-ed to this rank on March 3, 1899. He originally entered the States naval service on November 28, 1861.

n the 1st day of July, 1899, he was in command of the U. S. S. ster," said vessel being at sea, and so continued in command of ssel at sea until the 2d day of December, 1899, when, by order Secretary of the Navy, he was detached from said command at es, West Indies, by telegraphic orders as follows, viz:

"ST. VINCENT, *30–11, 1899.*

LONG To Capt. THOMAS, 'Lancaster,' St. Vincent:

ached 'Lancaster' proceed Washington reporting Navy Depart-hief Staff Asiatic Station.

"WASHINGTON."

telegraphic order was later supplemented by the following written iz:

'JOHN D. LONG,
"*Secretary.*

NAVY DEPARTMENT,
Washington, November 29, 1899.

'W. A. M.
96041

: You are hereby detached from duty in command of the U. S. ancaster,' will proceed immediately to Washington, D. C., and at the Navy Department, at that place, for special temporary

d yourself in readiness for orders to sea duty.

s employment on shore duty is required by the public interests.

Respectfully,

"(Sgd.) A. S. CROWNINSHIELD,
"*Acting Secretary.*

tain CHARLES M. THOMAS, U. S. N.,
"U. S. T. S. 'Lancaster.'

O.) (Confirming telegram.)

"

He left Barbadoes December 2, 1899, taking passage in the merchant steamer "Wordsworth," and arrived in New York on the 11th day of December, 1899. In obedience to the above orders from the Navy Department at Washington in person on December 12, 1899, and returned the next day to Yonkers, New York, and continued there in accordance with the authority of the Navy Department, and while at Yonkers received the following orders:

"JOHN D. LONG,
"*Secretary.*
"W. A. M.
"199226.

NAVY DEPARTMENT,
Washington, December 13, 1899.

"SIR: Proceed to San Francisco, Cal., thence to Hongkong, taking passage in the steamer sailing from San Francisco on January 6, 1900, and upon your arrival at Hongkong report by cable to the commander in chief of the Asiatic Station for further instructions.

"You are authorized to apply to the army quartermaster,
3 accompanying your application with a certified copy of these orders, for transportation of your baggage, including five hundred pounds of baggage by express.

"Respectfully,

(Sgd.) J. D. LONG, *Secretary.*

"Captain CHARLES M. THOMAS, U. S. N.,
"18 Baldwin Place, Yonkers, N. Y.
"L. D."

"BUREAU OF NAVIGATION,
"NAVY DEPARTMENT,
"*Washington D. C., December 14, 1899.*

"DEAR SIR: Orders have this day been issued to Captain Theodore F. Jewell, detaching him from command of the U. S. S. 'Brooklyn,' upon your reporting as his relief. The commander in chief of the Asiatic Station has been directed to assign you to the command of the 'Brooklyn' as the relief of Captain Jewell, also as chief of staff.

"Your orders to proceed to Hongkong will doubtless have reached you before this. In order to get the full advantage of the mileage under these orders you must purchase your own transportation to Hongkong, and not depend on the Navy agents.

"Yours, truly,

"(Sgd.) A. S. CROWNINSHIELD,
"*Chief of Bureau.*

"Captain CHARLES M. THOMAS, U. S. N.,
"No. 18 Baldwin Place, Yonkers, N. Y.
"L. F. C.

"Admiral Watson has been advised that you will sail Jan. 6, and directed to assign you to command 'Brooklyn.'"

"JOHN D. LONG,
"*Secretary.*

NAVY DEPARTMENT,
Washington, December 14, 1899.

"W. A. M.
"199276.

"SIR: Upon assuming command of the U. S. S. 'Brooklyn,' you will report to the commander in chief of the Asiatic Station for duty as his chief of staff.

"Respectfully,

"(Sgd.) A. S. CROWNINSHIELD,
"*Acting Secretary.*

"Captain CHARLES M. THOMAS, U. S. N.,
"18 Baldwin Place, Yonkers, N. Y."

4 On the 29th day of December, 1899, he left New York for San Francisco, arriving there the 3d of January, 1900. He left San Francisco on the merchant steamer "Gælic" on the 6th day of January, 1900, arriving at Hong Kong, China, on the 6th day of February. By direction of the commander in chief his orders were modified, and he was directed to assume command of the U. S. S. "Baltimore," and the Department's orders for duty as chief of staff were revoked by the commander in chief of the Asiatic Station. He assumed command of the U. S. S. "Baltimore" at Hong Kong, China, on the 7th day of February, 1900, and continued in the command of said vessel in Chinese waters, and their vicinity, until April 17, 1900, when he was detached by proper orders from the command of the U. S. S. "Baltimore," and assumed the command of the U. S. S. "Brooklyn," at Yokohama, Japan. He continued in command of said vessel serving in China and in the Philippine Islands, and in the waters between China and the Philippines and the waters in their immediate vicinity on said vessel until the 4th day of April, 1901, when he was detached from the command of the "Brooklyn" at Manila, Philippine Islands, by proper orders, and left Manila on the merchant steamer "Esmeralda" for Hong Kong, arriving there on the 7th day of April, 1901, and the same day assumed the command of the U. S. S. "Oregon." He has continuously remained in command of the "Oregon" on sea duty since said date and in command of the said vessel and brought that vessel from the Asiatic Station to the United States, arriving at Bremerton in Puget Sound on the 6th day of July, 1901, where he has since remained in command of said vessel at the navy-yard there.

3. The laws governing this pay while engaged in the duty as above set forth are as follows:

5 (1) The Navy Personnel Act of March 3, 1899 (30 Stat. L., 1007), as follows:

"That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army;

"Provided, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this

provision shall not apply to warrant officers commissioned under section twelve of this act."

(2) Revised Statutes, § 1466, giving to a captain in the Navy the relative rank of a colonel in the Army;

(3) Revised Statutes, § 1261, giving the yearly pay of $3,500 to a colonel in the Army; Revised Statutes, § 1262, granting ten per cent of the current yearly pay for each term of five years' service to all commissioned officers; Revised Statute, § 1267, providing that the pay of a colonel shall in no case exceed $4,500 a year.

(4) The act of May, 26, 1900 (31 Stat. L., 211), as follows:

"That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and the Territory of Alaska, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace."

(5) The act of March 2, 1901 (31 Stat. L., 903), as follows:

"That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace and the time
6 of such service shall be counted from the date of departure from said States to the date of return thereto;

"Provided, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such service the same increase of pay proper as is herein provided for."

4. During the entire period from July 1, 1899 to September 30, 1901, the claimant was paid at the rate of $4,500 a year, being the rate of pay fixed by §§ 1261, 1262, and 1267 of the Revised Statutes, for a colonel of the Army of over twenty years' service, excepting that from December 2, 1899, to January 6, 1900, he was paid fifteen per cent less pay than the above amount in supposed conformity with the act of March 3, 1899, § 13, at the rate of $3,825 a year.

5. He claims that he is entitled from May 26, 1900, to September 30, 1901, for the service stated above under the several acts above cited, to pay at the rate of $4,950 a year, being in excess of the amount paid him. This excess amounts to the following:

From May 26, 1900, to September 30, 1901, sixteen months and five days at the rate of $450 a year	$606. 25
From December 2, 1899, to February 6, 1900, in addition to the above amount, the difference between shore pay and sea pay at the rate of $675 a year for two months and five days .	122. 36
Total	728. 61

6. Under §§ 1578 and 1585, Revised Statutes, all officers while at sea or attached to sea-going vessels are entitled to one ration or commutation therefor at the rate of thirty cents a day. He did not receive any ration or commutation therefor while at sea or attached to a sea-
7 going vessel as above set forth, and claims commutation at the rate of thirty cents a day from the 1st day of July, 1899, to the

30th day of September, 1901, except for the period from December 2, 1899, to February 6, 1900, for which period he makes no claim, the same amounting to $226.50.

7. While traveling under orders as above stated, from Barbadoes to New York, he was paid expenses of transportation and subsistence amounting to $50, but was not paid mileage. The distance between said points is 2,106 miles, and he claims to be entitled, by virtue of the provisions relating to mileage for the Army, under the act of March 3, 1899 (30 Stat. L., 1068), to mileage for the entire distance at the rate of seven cents a mile, amounting to $147.42, less the amount as above stated already paid for traveling expenses, a difference of $97.42.

No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant claims one thousand and fifty-two dollars and fifty-three cents ($1,052.53).

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

UNITED STATES OF AMERICA, } ss:
U. S. Naval Station, Puget Sound. }

Chas. M. Thomas, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

CHAS. M. THOMAS.

Subscribed and sworn to before me this 31st day of December, 1901.

[SEAL.]

W. T. BURWELL,
Capt., U. S. N., Commandant
U. S. Naval Station, Puget Sound.

8 In the Court of Claims of the United States, December Term, A. D. 1902.

II. *Traverse.*

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every

allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

Filed November 5, 1902.

9 III. *Findings of fact and conclusions of law.*

This case having been heard by the Court of Claims, the court, on the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant entered the United States Navy as an acting midshipman on the 28th day of November, 1861, and has served continuously in the Navy since that date. He became a captain on March 3, 1899, and has since continuously served in that grade.

II.

Claimant was relieved as commanding officer of the "Lancaster" December 2, 1899, and ordered to report to the Navy Department. He reported at the Navy Department December 12, 1899. He was paid during that period at the rate of $3,825 per annum. On December 13, 1899, he was ordered to proceed to Hongkong for duty on the Asiatic Station, and sailed by merchant steamer sailing from San Francisco, January 6, 1900. He reported in obedience to said orders and was assigned to the command of the U. S. S. "Baltimore" February 7, 1900. April 16, 1900, he was detached from the "Baltimore" and ordered to command the U. S. S. "Brooklyn," April 17. On March 26, 1901, he was ordered detached from the command of the "Brooklyn" on reporting of his relief and ordered to the command of the U. S. S. "Oregon." He was detached from the former vessel April 4, and reported on the latter vessel April 7, of which he remained in command until July 6, 1901. On April 5 and 6, 1901, he was traveling from Cavite to Hongkong on the merchant steamer "Esmeralda."

III.

When relieved as commanding officer of the "Lancaster," the vessel was at Barbados, West Indies. The claimant took the merchant steamer "Wordsworth" from Barbados to New York. The distance is 2,106 miles. Transportation was furnished the claimant from Barbados to New York at a cost of $50. No other allowance was made to the claimant for travel between these places.

IV.

From July 1, 1899, to September 30, 1901, the claimant was attached to a seagoing vessel, except from December 3, 1899, to February 6, 1900, and on April 5 and 6, 1901.

V.

From May 26, 1900, until April 4, 1901, the movements of the U. S. S. "Brooklyn," of which the claimant then had command, were as follows, as officially reported by the Bureau of Navigation:

MOVEMENTS OF VESSELS.

Name of vessel and port visited.	Date of arrival.	Date of departure.	Distance sailed.	Remarks.
"BROOKLYN."			*Knots.*	
Hongkong, China	May 5, 1900	May 26, 1900	1,785	Docking and repairs.
Cavite, P. I.	May 28, 1900	June 26, 1900	634	Headquarters on station.
Hongkong, China	June 28, 1900	June 30, 1900	658	Special duty en route to Nagasaki, Japan, for coal.
Nagasaki, Japan	July 3, 1900	July 5, 1900	953	Received 822 tons of coal.
Chefoo, China	July 7, 1900	July 7, 1900	607	Stopped two hours for News of "Oregon."
Off Taku, China	July 8, 1900	Oct. 11, 1900	210	North China relief expedition.
Chefu, China	Oct. 12, 1900	Oct. 12, 1900	556	For wash clothes and provisions.
Nagasaki, Japan	Oct. 14, 1900	Oct. 20, 1900	436	To grant liberty to crew.
Woosung, China	Oct. 23, 1900	Oct. 28, 1900	1,265	To coal ship.
Cavite, P. I.	Nov. 3, 1900	Nov. 17, 1900	65	Headquarters on station.
Olongapo, P. I.	Nov. 17, 1900	Nov. 19, 1900	65	Transporting governor-general of Philippines.
Cavite, P. I.	Nov. 19, 1900	Dec. 8, 1900	361	Headquarters on station.
Iloilo, P. I.	Dec. 10, 1900	Dec. 16, 1900	358	Commission for naval site in the Philippines.
Cavite, P. I.	Dec. 17, 1900	Dec. 22, 1900	65	Headquarters on station.
Olongapo, P. I.	Dec. 22, 1900	Dec. 29, 1900	65	Commission for naval site in the Philippines.
Manila, P. I.	Dec. 29, 1900	Jan. 31, 1901	655	Headquarters on station.
Hongkong, China	Feb. 3, 1901	Feb. 25, 1901	649	For docking and repairs.
Cavite, P. I.	Feb. 27, 1901	Apr. 10, 1901	4,002	Headquarters on station.

10

VI.

From April 7, 1901, until June 12, 1901, the movements of the U. S. S. "Oregon," of which the claimant was then in command, was, as officially reported by the Bureau of Navigation, as follows:

Name of vessel and port visited.	Date of arrival.	Date of departure.	Distance sailed.	Remarks.
"OREGON."			*Knots.*	
Hongkong	Feb. 22, 1901	Apr. 13, 1901	862	Exchanging men.
Off mouth of Yangtsi	Apr. 17, 1901	Apr. 19, 1901	51	Anchored on account of thick weather.
Woosung, China	Apr. 19, 1901	May 5, 1901	1,060	Exchanging men.
Yokohama, Japan	May 11, 1901	May 16, 1901	3,466	Coaling ship.
Honolulu	May 30, 1901	June 4, 1901	2,085	Do.
San Francisco, Cal	June 12, 1901			Transferring ammunition to Mare Island.

VII.

Between December 2, 1899, when relieved as commanding officer of the U. S. S. "Lancaster" and ordered to report to the Navy Department, and February 7, 1900, when he took command of the U. S. S. "Baltimore" at Hongkong, China, he was paid only shore pay, $3,825 a year, 15 per cent less than sea pay; from May 26, 1900, to September 30, 1901, the claimant was paid at the rate of $4,500 a year, except for April 5 and 6, 1901, when he was paid at the rate of $3,825 a year. The rate of $4,500 is the pay fixed by law for a colonel in the Army of over

twenty years' service under sections 1261 and 1262 of the Revised Statutes as applied to the Navy by the act of March 3, 1899 (30 Stat. L., 1007 and R. S., sec. 1466). The rate of $3,825 is 15 per cent less than that amount, the percentage required to be deducted for service on shore in accordance with the act of March 3, 1899.

VIII.

On May 26, 1900, while the claimant was in command of the U. S. S. "Brooklyn," she left Hongkong and went directly to Cavite. While at Cavite she remained in the bay of Manila, off the naval station, about a half mile from Sangley Point and two miles from Cavite.

IX.

On leaving Cavite, on June 26, 1900, the vessel went to Hongkong for diplomatic reasons connected with the disturbed condition of affairs in China. Beside her regular complement of men, she had on board 19 marine officers and a battalion of 300 marines. The vessel then proceeded to Taku, stopping at Nagasaki, Japan, to coal, and at Chefoo to inquire as to the condition of the "Oregon." The anchorage of the "Brooklyn" was about 12 miles off the mouth of the Peiho River in the Gulf of Pechili, it being impossible to approach nearer with so large a vessel, on account of shallow water. The "Newark" was there present on the arrival of the "Brooklyn," and the "Yorktown" and the "New Orleans" arrived later, as well as the dispatch boat "Zafiro," and the "Buffalo." All of the naval powers of the world were represented there by about fifty war vessels, and the presence of the "Brooklyn" there was on account of the Boxer difficulties then existing in north China. The "Brooklyn" cooperated with the army on shore by assisting them to land, providing them with steam tenders and steam launches, and towing them from the anchorage to Tongku. There were frequent conferences on board the "Brooklyn" between the military authorities and the admiral and other officers. General Chaffee boarded the "Brooklyn" on his arrival to consult the commander in chief, and the army quartermaster in charge of transportation was in frequent conference in regard to the facilities for landing the United States troops. The marines on board the "Brooklyn," under Colonel Meade, were landed, and the commander in chief of the naval force went up to Tientsin in person, after the fight at Tientsin, to investigate the condition of the marines there. The officers of the army in passing visited the "Brooklyn" to pay their respects to the commander in chief as the senior military representative of the United States in China, and those of higher rank called to consult him as to the state of affairs on shore. The flagship "Brooklyn" had a representative on shore in connection with the military operations, Lieut. Julian L. Latimer, detailed as a naval aid to General Chaffee, who remained with him for a period of about six weeks. He accompanied him in the expedition for the relief of Pekin, and was present at
11 the capture of Pekin and the retreat of the Chinese forces. His principal duty was to keep the commander in chief thoroughly advised of the state of affairs, and this information was communicated to the Government at Washington by cablegram, through the naval dispatch

boat "Zafiro" carrying all messages to Chefoo. On the return of the "Brooklyn" to Cavite, leaving Taku on October 11, 1900, the vessel stopped at Nagasaki and replenished with coal, going thence to Shanghai, anchoring at Woosung, the man-of-war anchorage for Shanghai, and coaled ship there.

X.

On reaching Cavite, on November 3, 1900, the "Brooklyn" anchored off the city of Manila, where it served as the headquarters of the commander in chief in the Philippine waters. She was used to transport the governor-general of the Philippines for a tour of inspection to Olongapo, keeping on that trip from half a mile to 3 miles from land. She went to Iloilo to permit an inspection by a board ordered by the Navy Department to select a naval station in the Philippines, keeping distant from shore on that trip from an eighth of a mile to 2 miles. She took another trip to Olongapo in connection with the investigation of a naval station, going and returning by substantially the same route as on the former trip. Between these trips, and afterwards until leaving Manila, the vessel remained at headquarters on the station.

XI.

While at Hongkong in February, 1901, the vessel was at the Kowloon dockyard being docked and undergoing minor repairs.

XII.

After the return of the "Brooklyn" to Cavite she became headquarters on the station again in the bay of Manila, and so continued until after March 2, 1901.

XIII.

From June 12, 1901, to September 30, 1901, the "Oregon," of which the claimant remained in command, was at San Francisco, Cal., and at Bremerton, Wash., in the waters of Puget Sound and en route between those two points.

XIV.

At no time between July 1, 1899, and September 30, 1901, did the claimant receive a sea ration or commutation therefor under Revised Statutes, sections 1578 and 1585.

XV.

It has been the practice of the Pay Department to pay officers of the Army serving on board U. S. A. transports the ten per cent increase of pay provided for by act of March 2, 1901, from date of departure from the United States to date of their return to, inclusive.

Since May 26, 1900, army officers serving on army gunboats in the Philippines have been paid the ten per cent increase provided for by the acts of March 2, 1901, and May 26, 1900.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact, the court decides, as conclusions of law:

1. That the claimant is entitled to recover on Findings III (3) the sum of ninety-seven dollars and forty-two cents ($97.42), being for the travel from Barbados to New York in a merchant steamer, exclusive of the $50 heretofore allowed the claimant for expenses.

2. That the claimant is entitled to recover on Findings V, VI, VIII, IX, XI, XII, ten per cent increase on his pay proper in accordance with the following computation:

Sea pay from May 26, 1900, to April 4, 1901, 10 months 9 days, at $4,500.00 per ammum, $375.00 per month	$3,862.50	
10% additional pay	386.25	
Shore duty pay, 10% additional, less 15% for April 5 & 6, 1901, at $4,207.50 per annum	23.37	
Sea pay from April 7, 1901, to June 12, 1901, 2 months 6 days, at $4,500.00 per annum	825.00	
10% additional pay	82.50	
		$5,179.62
12 Less amount paid:		
Sea pay from May 26, 1900, to April 4, 1901, 10 months 9 days, at $4,500.00 per annum	$3,862.50	
Shore-duty pay for April 5 & 6, 1901, at $3,825.00 per annum	21.25	
Sea pay from April 7, 1901, to June 12, 1901, 2 months & 6 days, at $4,500.00 per annum	825.00	
		4,708.75
Balance		$470.87

being a total recovery of five hundred and sixty-eight dollars and twenty-nine cents ($568.29).

3. That the petition, in respect to all other claims, be dismissed.

BY THE COURT.

IV. *Opinion of the court and dissenting opinion.*

PEELLE, J., delivered the opinion of the court:

The claimant, a captain in the United States Navy, bases his right to recover the pay and allowances of an officer of the Army of corresponding rank, after twenty years' service, under section 13 of the act March 3, 1899 (30 Stats. L., 1007), which, so far as applies to the present case, is as follows:

"SEC. 13. That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army:

"Provided, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty. * * *

"Provided further, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places. * * *

"And provided further, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law."

The several claims are stated by counsel in their brief as follows:

1. While traveling under orders from Barbados to New York in December, 1899, he was paid $50 as expenses, but was not paid mileage. He claims mileage at the army rate of 7 cents a mile, less the amount already paid him.

2. Between December 2, 1899, when relieved as commanding officer of the U. S. S. "Lancaster" and ordered to report to the Navy Department, and February 7, 1900, when he took command of the U. S. S. "Baltimore" at Hongkong, China, he was paid only shore pay, $3,825 a year, 15 per cent less than sea pay. He claims sea pay, $4,500 a year, during that time.

3. From May 26, 1900, to March 1, 1901, he was paid sea pay of a captain, at $4,500 a year, and claims 10 per cent increase of this pay for service in the Philippines and in China, under the acts of May 26, 1900, and March 2, 1901 (31 Stat. L., 211, 903).

4. From March 2, 1901, to June 11, 1901, he was paid the sea pay of a captain, $4,500 a year, and claims 10 per cent of this pay for service outside the United States, under the provisions of the act of March 2, 1901 (31 Stat. L., 903).

5. From June 12, 1901, to September 30, 1901, he was paid sea pay at $4,500 a year, and claims 10 per cent increase under the act of March 2, 1901, for service outside the United States. During this time he was in the waters of San Francisco Bay, traveling from San Francisco to Puget Sound, and in the waters of Puget Sound. This claim is made provisionally in case his service in Chinese and Philippine waters is not considered to be service "in China" and "in the Philippine Islands," entitling him to 10 per cent increase from May 26, 1900, to March 1, 1901. In that event he would claim that his service in waters of the United States was beyond the limits of the States comprising the Union. This claim is asserted only as an alternative to the claim for 10 per cent increase during the earlier period.

6. He claims commutation of sea ration under Revised Statutes, sections 1578 and 1585, from July 1, 1899, to September 30, 1901,
13 except from December 3, 1899, to February 1, 1900, and on April 5 and 6, 1901, when he was not attached to a seagoing vessel.

1. In respect to the claim first mentioned, for mileage, it appears from Findings II and III that the claimant, while commanding officer of the U. S. S. "Lancaster" at Barbados, West Indies, was relieved therefrom and ordered to report to the Navy Department. He traveled from Barbados to New York in the merchant steamer "Wordsworth," a distance of 2,106 miles, for which he was furnished transportation at a cost of $50.

He claims mileage under the provisions of the army appropriation act, March 3, 1899 (30 Stat. L., 1064–1068), which reads: "For mileage to officers and contract surgeons, when authorized by law, five hundred thousand dollars: Provided, That hereafter the maximum sum to be allowed and paid to any officer of the Army shall be seven cents per mile, distances to be computed over the shortest usually traveled routes, * * * Provided further, That actual expenses only shall be paid to officers when traveling to and from our island possessions in the Atlantic and Pacific oceans." These provisions the claimant contends are made applicable to him by the provisions of section 13 above quoted.

The claim for mileage, however, is governed by the case of Chauncy Thomas v. United States (38 C. Cls. R., ——), recently decided by this court; and following that decision the claimant is entitled to recover.

2. As to the claim for sea pay while traveling under the order of the Navy Department in a merchant vessel from December 2 to December 12, 1899, such travel being from Barbadoes, the place of his detachment from the U. S. S. "Lancaster," the decision in the case of Ryan v. The United States (38 C. Cls., ——), just decided, is controlling, and following that decision the claimant is not entitled to recover sea pay during such travel subsequent to his detachment from the vessel in which he was performing sea service. Nor is the claimant entitled to recover sea pay while traveling to his post of duty on a merchant vessel from San Francisco to Hong Kong, for the reason that when he was detached from the U. S. S. "Lancaster" he thereby ceased to perform sea service and became entitled to the lower or exceptional rate of pay provided for by the proviso to section 13, and that rate of pay continued until he reached the vessel to which he was subsequently assigned, as "no service shall be regarded as sea service except such as shall be performed at sea under the order of a department and in a vessel employed by authority of law."

3. The claim for 10 per cent increase over and above the rates of pay proper from May 26, 1900, to March 1, 1901, for service in the Philippine Islands and in China, is based on the provisions of the army appropriation acts of May 26, 1900, and March 2, 1901 (31 Stat. L., 211 and 903), the first of which provisions reads: "For additional twenty per centum increase on pay of enlisted men, four million five hundred and twenty-four thousand seven hundred and fifteen dollars: Provided, That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace." * * *

That provision, it will be noted, has reference to the service of
14 the Army in our island possessions, while the provisions of the act of March 2, 1901, have reference to service outside the United States and in China, and read as follows:

"For additional ten per centum increase on pay of officers serving at foreign stations, five hundred thousand dollars:

"Provided, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the United States comprising the

Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto:

"Provided further, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such service the same increase of pay proper as is herein provided for." * * *

Those provisos the claimant contends are applicable to officers of the Navy by virtue of the provisions of section 13, act of March 3, 1899 (supra). But as the provision of section 13 only makes those statutes applicable to officers of the Navy "when detailed for shore duty beyond seas," at places similar to those where officers of the Army are detailed for duty, it follows that to entitle the claimant to the 10 per cent increase provided for by those acts to officers of the Army, it must be made to appear that the claimant was "detailed for shore duty beyond seas."

This he has failed to do. On the contrary, as shown by Findings VIII to XII, both inclusive, the claimant was in command of the U. S. S. "Brooklyn," a vessel in commission for sea service at the Asiatic Station, and being in commission, with her complement of officers and enlisted men aboard, it matters not what her proximity was to a foreign shore (United States v. Barnette, 165 U. S., 174); and this was correctly the view of the accounting officers of the Treasury Department, for the claimant was paid during that period the higher or sea pay of his grade, as set forth in Finding VII.

But, as this question was passed upon adversely to the claimant's contention in the case of Ryan v. The United States (38 C. Cls. R., —), we need not pursue it further.

4. The claim for 10 per centum increase on the pay proper from March 2 to June 11, 1901, for service "beyond the limits of the United States comprising the Union and the Territories contiguous thereto," is also based on the act March 2, 1901, supra, being the first proviso thereto, as set forth above.

That provision, however, like the preceding one for service in China, is only made applicable to naval officers by the provision of section 13, "when detailed for shore duty beyond seas." As the claimant was serving as commanding officer of the U. S. S. "Oregon," a vessel in sea service, during the period claimed for, he was not doing shore duty, and is not, therefore, entitled to recover.

This question is also disposed of by the ruling in the case of Ryan v. The United States (supra).

5. The claim for 10 per centum increase under said act of March 2, 1901, from June 12 to September 30, 1901, also for service "beyond the limits of the United States comprising the Union and the Territories contiguous thereto," originated, if at all, while the claimant, as shown by Finding XIII, was in command of the U. S. S. "Oregon," a vessel in commission, serving in the waters adjacent to the Pacific coast.

This claim is stated by counsel in their brief as an alternative one. That is to say, if the claimant's "service in Chinese and Philippine

waters is not considered to be service in China and in the Philippine Islands, entitling him to 10 per centum increase from May 26, 1900, to March 1, 1901," then "he would claim that his service in the waters of the United States was beyond the limits of the United States comprising the Union."

The claim for the increase in China and in the Philippine Islands is disposed of adversely to the claimant, both in the Ryan case, supra, and in this case, and we will therefore consider the alternative claim for service in the waters of the United States; i. e., in the waters of San Francisco Bay and Puget Sound, and while en route between San Francisco and Bremerton, Wash.

This service, the claimant contends, was service "beyond the limits of the United States," within the meaning of the act of March 2, 1901, providing "that hereafter the pay proper of all officers and enlisted men serving beyond the limits of the United States comprising the Union and the Territories contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

But, as before stated, as that act is only made applicable to officers of the Navy by section 13, act of 1899, "when detailed for shore duty beyond seas" at places similar to those at which officers of the Army are detailed for duty, it follows that such service was not shore duty; nor was it service at places similar to those at which officers of the Army are detailed for duty.

The claimant's service was clearly at sea, as shown by Finding VII, and he was paid, during said period, the sea pay of his grade; and he is not, therefore, entitled to the increase of 10 per centum.

Those cases granting the increase of 10 and 20 per centum on the pay proper of officers and enlisted men in the Army were a recognition by the Congress of the extra hazards attending the service in China and in the Philippine Islands, both by reason of the climatic conditions and the oriental and uncivilized modes of warfare, as well as the contagious diseases common in those countries, with which the land forces had necessarily to come in contact.

These hazards did not apply to the officers and enlisted men of the Navy who were aboard their respective vessels at sea, and therefore to entitle them to the increase within the meaning of section 13 they must show that they were detailed for shore duty in those countries similar to that performed by officers of the Army.

Under this head counsel for claimant also discuss the question as to the basis upon which the 10 per centum increase should be calculated. The acts of May 26, 1900, and March 2, 1901, supra, say: "That hereafter the pay proper of all officers * * * shall be increased 10 per centum."

The question presented, therefore, is as to the meaning of the words "pay proper." That is to say, whether the minimum pay of an
16 officer in the Army, or his minimum pay plus his longevity pay, shall form the basis for calculating the increase of 10 per centum.

But as we have reached the conclusion that the claimant is not entitled to recover the 10 per centum increase provided for by the acts hereinbefore set forth, we refrain from expressing any opinion as to the meaning of the words.

6. The claim for commutation of sea ration under Revised Statutes, sections 1578 and 1585, while attached to a seagoing vessel, is claimed as additional to the allowances provided for by section 13, act of March 3, 1899. Those sections are:

"SEC. 1578. All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a seagoing vessel."

"SEC. 1585. Thirty cents shall in all cases be deemed the commutation price of the navy ration."

Prior to the passage of the act of March 3, 1899, all officers of the Navy "while at sea or attached to a seagoing vessel," were entitled to the ration or the commutation price therefor.

The defendant's contention is that by the provision of section 13 those sections of the Revised Statutes are repealed by necessary implication. The provision of section 13 relied upon is: "That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The first and obvious rule of construction invoked by the claimant is that repeals by implication are not favored, and that if the provisions of said sections 1578 and 1585 are not repugnant to said section 13 the statutes should be construed together and effect be given to each.

Counsel on both sides have ably presented their views and cited numerous authorities in support of their respective contentions. The question is one purely of construction, if construction be allowable under the phraseology of the section.

From the increase in the pay of officers of the Navy, as shown by the act of March 3, 1899, the court must assume either that there was some complaint, founded in justice, on the part of the officers of the Navy because their pay and allowances were less than officers of corresponding rank in the Army, or that the Congress, recognizing such inequality, sought to right it. The result was the passage of the act of 1899, by the express provisions of which the officers of the Navy therein classified are given "the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The question is, What did the Congress mean by the language used? The claimant's contention is: "That the granting of the same pay and allowances operates as a repeal of the old Navy pay and allowances only where the possession of the old Navy pay and allowances is inconsistent with the receipt of the Army pay and allowances." They concede that "in granting Army pay there is an implied repeal of the Navy pay, because there is an inconsistency between the receipt of both Army and Navy pay." And further that "the granting of Army mileage repealed the Navy mileage." But they say "the sea ration is an allowance which is not inconsistent with Army allowances, an
17 allowance for which no substitute is offered by the grant of Army

allowances," and which is "peculiarly appropriate to naval service for which there can not be an Army equivalent."

The act then, it is conceded and rightly so, operates to repeal by implication the prior acts granting pay and mileage to naval officers; and in addition thereto the act of 1899 grants to naval officers the Army allowances for quarters and fuel when on shore, an allowance not theretofore granted to naval officers.

Therefore in these respects it may fairly be said that the inequality in compensation theretofore existing between officers of the Army and Navy were corrected by the act of 1899. That is to say, they are given the "same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Thus officers of the Navy were not only given the same pay and allowances (except forage) to which officers of the Army were entitled at the time the act was passed, but the act contains a provision making future legislation, in respect to such pay and allowances, applicable to naval officers, thereby indicating the purpose of the Congress to maintain the policy of equality thus established.

The only allowance excepted is for forage, while the only exception in pay is, as set forth in the first proviso, "that such officers, when on shore, shall receive * * * fifteen per centum less pay."

Another significant provision in the section, however, is the last proviso, which reads:

"And provided further, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law."

That proviso, though by its terms applicable to the whole act, excepts from the purview of section 13 those commissioned officers of the Navy whose pay would thereby be reduced, and provides that as to them they "shall continue to receive pay according to existing law." And that such officers then in the service, who might thereafter be promoted, should continue to receive the benefit of that provision, the Congress, by the naval appropriation act June 7, 1900 (31 Stats. L., 684–697), provides that "section thirteen of the act approved March third, eighteen hundred and ninety-nine, entitled 'An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States,' is hereby so amended as to provide that nothing therein contained shall operate to reduce the pay which, but for the passage of said act, would have been received by any commissioned officer at the time of its passage or thereafter."

The original proviso to section 13 excepted from the purview thereof the commissioned officers "now in the Navy" whose "present pay" was thereby reduced, while the amendment thereto extends the exception so as to apply to the pay such officers may receive thereafter in case of promotion to higher grades.

We have thus pointed out the exceptions which we think material to aid us in ascertaining the meaning of section 13 as applicable to the present case. That is to say, the exception to Army allowance is forage; the exception to Army pay is when on shore, and then to guard against

reducing the pay, then being received, section 13 excepts from
8 the operation of the act those officers whose pay would thereby be reduced and expressly permits them to "continue to receive pay according to existing law."

If the Congress intended to continue the naval ration, it would seem that the place so to express it would have been in the proviso, wherein such officers are protected against any reduction of their old navy pay.

The words "same pay and allowances" would seem to indicate that the Congress intended, except as therein provided, to conform the pay and allowances of the commissioned officers of the line of the Navy and of the Medical and Pay corps to the pay and allowances of "officers of corresponding rank in the Army." Had the word "allowances" been omitted from the section, there would be much force in the claimant's contention. But the act embraces both subjects and the language justifies the conclusion that the act was intended as a new system for both pay and allowances.

The words "same pay and allowances, except forage," can mean but one thing, and that is that, after June 30, 1899, the commissioned officers of the line of the Navy and of the Medical and Pay corps "shall receive the same pay and allowances, except forage," as now is or may hereafter be provided by law "for the officers of corresponding rank in the Army."

Certainly those words would not be satisfied by giving naval officers less pay and allowances than therein provided for, nor would they be satisfied by giving them more, except as therein expressly provided for. It was to guard against giving them less pay than they were then receiving that the proviso was added, but we find no such provision saving to them the naval ration.

While, on the other hand, the acceptance of navy pay, when higher than army pay, does not operate to deprive such officers of the other provisions of the section granting them army allowances when on shore, and this, we think, materially strengthens the views we have expressed herein, i. e., that all the pay and allowances to which such officers are entitled, except as therein provided, are embraced in the act of 1899.

To hold that the words "same pay and allowances" are inconsistent with prior acts granting pay and mileage to naval officers, though consistent with the act granting an allowance for a ration, would be drawing a distinction without a difference. The words "same pay and allowances" embody a new system applicable to naval officers and must have a meaning independent of the prior acts covering the same subjects, except in those particulars as therein specially provided. That is to say, to continue the sea ration to naval officers, there must be added to the words "same pay and allowances" another proviso to the effect that such officers shall, in addition thereto, continue to receive the ration provided for by a prior act. To add those or equivalent words would be legislation.

Therefore, in the absence of some such provision all the pay and allowances to which officers of the line of the navy, and of the Medical and Pay corps, are entitled, except as therein expressly provided, are covered by the language in the purview of the section.

The word "same" means identical, not different or other, and to put a different construction on the language used would be a violation of the

well-known rule that where the language is free from ambiguity it is not allowable to interpret it.

While the rule is well established that where there are two acts on the same subject effect should be given to both if possible, yet the further equally well-established rule is "if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where the two are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." (United States v. Tynen, 11 Wall., 88, 92, and authorities cited therein.)

The act of 1899 covers the whole subject of pay and allowances to the officers of the Navy embraced in the purview of section 13, among which is the provision, new to naval officers, for army allowances for quarters and fuel as provided by Revised Statutes, section 1270, made applicable to naval officers by said section 13 when on shore.

The present case seems to come fairly within the decision last cited. Section 26, act of 1899, being the last section thereto, provides: "That all acts and parts of acts so far as they conflict with the provisions of this act are hereby repealed."

We therefore reach the conclusion that sections 1578 and 1585, granting to naval officers while at sea a ration, are inconsistent with and repugnant to the act of 1899, substituting army pay and allowances for the pay and allowance theretofore allowed to officers of the Navy, and being repugnant to said act of 1899 they are, if not by the express provision of section 26, above cited, necessarily repealed by implication.

The claimant is entitled to recover the sum of $97.42 for mileage, but the petition in respect to all other claims is dismissed.

19 Nott, Ch. J., dissenting:

The declared purpose of the navy personnel act is, in its own words (section 13), "That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army." Complaints had existed for fifty years that a discrimination was shown by Congress against the Navy, and by this statute Congress determined that the two arms of the service should thenceforth be treated precisely alike; that the pay of the Army and the pay of the Navy should be one and the same thing. It was inevitable that in the application of army law to naval services doubts should arise, but in the application of the statute the statute has given us one plain rule for guidance, and that is that the pay of army officers and navy officers in like official circumstances shall be precisely alike, save one exception hereafter to be named.

For more than one hundred years the pay of the Navy had been a thing by itself, both in fact and in legislation. (Act March 27, 1794, 1 Stat. L., p. 351.) By this navy personnel act all provisions relating to the pay of the Navy have been swept from the statute book. When we want to know what pay a naval officer should receive we must turn

to the provisions regulating army pay to see what the pay of an officer of relative rank may be; and when the statutes fixing and regulating navy pay became obsolete all the distinctions and forms and terms of navy pay became obsolete with them. If the nomenclature of the two arms of the service had been the same, all that the statute need to have said would have been, "Henceforth the pay of the officers of the Navy shall be the same as that of officers of the Army."

The controlling purpose of the navy personnel act being to make navy pay and army pay identical, it becomes the controlling principle by which the statute should be interpreted. The end always to be attained is that the pay of an officer of the Navy shall be the same as the pay of an officer of the Army of relative rank in the same official circumstances. Only one exception of pay is made by the statute. It relates to the detached service of shore duty and is contained in a proviso to the enacting clause, which is in these words: "*Provided*, That such officers when on shore shall receive the allowances, but 15 per centum less pay, than when on sea duty." Allowances and the 15 per centum therefore are alternative—when an officer is not entitled to the one he is entitled to the other.

But this does not mean that every time when an officer sets his foot on dry land he shall be docked 15 per centum of his pay. The proviso gives the officer the "allowances" of army officers—i. e., the allowances of army officers on duty. The next proviso, which is an amplification of the first, expressly uses the term "shore duty," declaring that "when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places." Unquestionably what is meant by the first proviso is that when officers are on detached service on shore and entitled to allowances they shall be docked 15 per cent of the army pay. Why the statute makes this discrimination against officers of the Navy is not apparent.

To clearly understand this proviso we must understand the condition of army officers "in similar circumstances."

When an army officer in the line is with his command he shares the chances of his battalion or regiment or company. If the regiment is in tents, he is in a tent; if the regiment bivouacs in the open air, he bivouacs in the open air; if the regiment is in a fort, he takes such of the officers' quarters as he can get. But when the officer is placed on detached service by proper authority he becomes entitled to quarters or commutation of quarters. It is not every officer absent from his regiment who is entitled to quarters or commutation of quarters, but only such as are placed on detached service by proper authority. When the officer is on detached service he is entitled to commutation, and when he is entitled to commutation it is because he is on detached service.

By analogy, the naval officer on board ship shares the comforts and hardships of those on board; when he is detached from his ship and assigned temporarily to another vessel he there shares the comforts and hardships of those on board. But when he is placed on the detached service of "shore duty" he becomes entitled on the one hand to all the allowances of an army officer on detached service, except forage, and, on the other hand, loses 15 per cent of his regular ordinary pay. By

the same analogy he is not entitled to these allowances unless he is placed on detached service by the proper authority, and, conversely, he does not lose 15 per cent of his pay until he is entitled to the benefit of the allowances.

20 As the army pay became the pay of the navy when navy pay was abolished, so the different kinds of army pay become the pay of naval officers when the conditions of their official duty require a departure from regular or active service pay. Ordinary pay, longevity pay, staff pay, leave-of-absence pay, and waiting-orders pay of the Army become the ordinary pay, the longevity pay, the staff pay, the leave-of-absence pay, and the waiting-orders pay of naval officers.

It is a well-known and established principle in military affairs that an officer assigned to duty by an order issued by proper authority remains charged with that duty and subject to that order until it is superseded by another. But there may be an interregnum between the moment when an officer is relieved from one duty before he is assigned to another, and during that interregnum he is said to be awaiting orders.

In the present case there was such an interregnum consisting of a single day. But that fact can not affect the result, for by the Revised Statutes (section 1265) army officers "waiting orders, shall receive full pay."

I come now to the consideration of the present case, or rather to one part of the present case—the pay of Captain Thomas when in transit from the command of a vessel on the Atlantic seaboard to the command of a vessel in Asiatic waters.

This ordinary pay of a naval officer in the performance of ordinary naval duties has been designated as his "regular or normal" pay. It is the regular or normal pay of an officer for two reasons: First, because it is pay for the performance of the ordinary normal duties of a naval officer; and, second, because it is prescribed by the enacting clause of the statute. When Congress were dealing with ordinary pay for ordinary duties they did so by prescribing the standard of pay in the enacting clause; but when they were dealing with the exceptional services of naval officers detached from their vessels and assigned to shore duty they put the legislation in the form of a proviso—that is to say, they made it an exception to the general rule for naval pay—that is to say, the exceptional pay is for shore service. Of the proviso it should be held—as was held long ago in the case of the United States v. Dickson (15 Peters, 141–165)—that it "carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof." Therefore, to bring the claimant within the terms of the proviso it is incumbent on the defendants to show that the claimant was "detailed" for duty on shore.

The general principle which should govern such cases is that where a naval officer is once assigned to the "regular or normal" duty of a sailor (service on shipboard) he remains entitled not to "sea pay," but to the regular or normal pay of an army officer of relative rank, unless he is by proper authority assigned to the exceptional service of shore duty.

What are the facts in this case?

The facts are that an officer serving on a vessel on the Atlantic station was ordered to report to the Navy Department; that he reported December 12, 1899; that on the 13th he was ordered to proceed to Hongkong for duty on the Asiatic station; that he crossed the continent and sailed by merchant steamer from San Francisco; that he reported to the commanding officer and was immediately assigned to the command of the "Baltimore." The service which he performed can not be regarded as constructively shore duty. He traveled from one vessel to another partly by land and partly on merchant steamers; but that was not shore duty. The orders to come and go in effect precluded him from performing shore duty, and certainly gave him no right to allowances. In other words, it does not appear that the defendants have done what the decision in United States v. Dickson says it is incumbent on them to do—they have not shown that the officer was performing duty on shore, and they have not shown that he was assigned to duty on shore, and therefore they have not brought him "within the terms of the proviso."

21 For some reason not disclosed to the court the Department wished to confer with this officer and ordered him to come to the Navy Department. No duty was assigned to him there. He reported at the Department on one day and was ordered to proceed to the Asiatic station on the next day. He had not been detailed to shore duty when he mounted the steps of the Navy Department and reported to the Secretary. If it was not shore duty to go up the steps of the Navy Department under the first order, I can not perceive why it was shore duty to go down again under the second, there having been no intermediate order of assignment to duty. Certainly the status of this officer continued unchanged until the Department changed it. But no new duty was assigned to him and no change of status was effected. Under the orders he gained nothing in allowances and lost nothing in pay.

It must also be noted that any other rule of construction will embarrass the Secretary of the Navy in the administration of his duties. It is undoubtedly always the right, and often the duty, of the Secretary of the Navy to confer personally with naval officers. In this instance he may have wished to obtain information concerning the vessel or fleet on the Atlantic station; or he may have wished to give the officer informal oral instructions concerning movements on the Asiatic station; or he may have wished to see personally and form some estimate of this officer's intelligence or prudence. If the Secretary of the Navy can not call an officer into his office to confer with him without changing his legal status he will be loath to do so. Certainly such a conference for the information of the Secretary, for the good of the Navy, for public considerations, for no advantage or benefit to the officer, should not be required at his expense.

My conclusion is that this officer not having been "detailed" for "shore duty," and not having been entitled to "allowances" was not liable to be deprived of 15 per centum of his pay.

And thereupon, to wit, on the 5th day of January, 1903, the court ordered judgment to be entered in favor of the claimant in the sum of ninety-seven dollars and forty-two cents ($97.42).

Subsequently, to wit, on the 9th day of March, 1903, the claimant, by his attorneys, filed a motion for a new trial, as follows:

22 V. *Motion for new trial filed March 9, 1903.*

Now comes the claimant, by his attorneys, and moves the court to set aside the judgment rendered in this cause on the fifth day of January, 1903, whereby his petition in respect to all claims other than for mileage was dismissed, and grant a new trial, and in support of this motion assigns the following grounds:

1. Error of law in the disallowance of his claim for an increase of ten per cent on his pay proper from May 26, 1900, to March 1, 1901, while serving in the Philippine Islands and China.

2. Error of law in the disallowance of ten per cent increase on his pay proper from March 2, 1901, to June 11, 1901, while serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

3. Error of law in the disallowance of sea pay while traveling under orders on a merchant steamer.

GEORGE A. and WILLIAM B. KING,
Attorneys for Claimant.

23 VI. *Opinion of the court, and order.*

This motion was argued and submitted and on the first day of June, 1903, the court filed the following opinion and order:

PEELLE, J., delivered the opinion of the court:

The question in this case now arises on the claimant's motion for a new trial on the grounds:

1. Error of law in the disallowance of his claim for an increase of 10 per cent on his pay proper from May 26, 1900, to March 1, 1901, while serving in the Philippine Islands and China.

2. Error of law in the disallowance of 10 per cent increase on his pay proper from March 2, 1901, to June 11, 1901, while serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

3. Error of law in the disallowance of sea pay while traveling under orders on a merchant steamer.

In the former opinion in this case (38 C. Cls. R., —) the right of the claimant to the 10 per cent increase in his pay proper under the acts of May 26, 1900, and March 2, 1901 (31 Stats. L., 211 and 903), was made to depend upon the second proviso to section 13, act March 3, 1899 (30 Stats. L., 1007), and that ruling is made the basis in part for the motion for a new trial.

Section 13, act of 1889 (supra) reads:

"Section 13. That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army:

"Provided, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty. * * *

"Provided further, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places. * * *

"And provided further, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law."

The Army appropriation acts of May 26, 1900, and March 2, 1901 (supra), read:

"For additional twenty per centum increase on pay of enlisted men, four million five hundred and twenty-four thousand seven hundred and fifteen dollars: Provided, That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace.

"For additional ten per centum increase on pay of officers serving at foreign stations, five hundred thousand dollars:

"Provided, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the United States comprising the Union and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.

24 "Provided further, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such service the same increase of pay proper as is herein provided for." * * *

It will be observed that the provisions of the act of May 26, 1900, have reference to the services of officers and enlisted men of the Army in Cuba and in our island possessions, while the provisions of the act of March 2, 1901, have reference to such service outside the United States and in China.

The claimant's contention is that the acts granting the 10 per cent increase of the pay proper of such officers and enlisted men is made applicable to the commissioned officers of the line of the Navy and of the Medical and Pay corps by the enacting clause of section 13 of the act of 1899, above quoted. That clause provides that such naval officers "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The acts granting the 10 per cent increase to officers of the Army are based on their "serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska," and "beyond the limits of the United States comprising the Union and the Territories of the United States contiguous thereto," and in China since May 26, 1900.

As the primary purpose of those acts was to grant to officers and enlisted men in the Army 10 per cent increase on condition of their service in China, Cuba, and the territorial possessions named, the court in its

former opinion labored under the belief that to entitle naval officers to such increase it was incumbent upon them to show that they had, in the language of the second proviso to section 13, been "detailed for shore duty beyond seas;" that is to say, to entitle naval officers to the 10 per cent increase it was held that they must perform shore service beyond seas at places similar to those where officers of the Army were detailed for duty.

The proviso preserves to naval officers when so detailed "the same pay and allowances" as that given to officers of the Army for like service, and hence when a naval officer is detailed "for shore duty beyond seas" he is entitled to the sea pay of his grade. This was the view taken in the former decision, but the court went further and held that such increase did not attach to the pay of naval officers while performing sea service in the waters adjacent to those islands or in the Chinese waters, and herein, the claimant contends, lies the error of the court in respect to such increase in pay.

The simple question, therefore, is: Do the acts granting the 10 per cent increase apply to naval officers while performing sea service in those waters? Clearly, the purpose of the enacting clause of section 13 was to assimilate the pay of naval officers to army pay, and that is accomplished in the language of the clause, by giving them "the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army." The only exception there stated is that the allowances shall not include forage.

The claimant's services for which he claims the 10 per cent increase were rendered on the U. S. S. "Brooklyn" and "Oregon" (vessels in commission) in the Chinese and Philippine waters in cooperation with the land forces of the United States, and the claimant thereby rendered valuable services to the Government.

On a review of this case we reach the conclusion that for the services rendered by the claimant in those waters he is entitled to the increased pay provided for. This, however, does not include the services rendered by the claimant in cruising along the Pacific coast between San Francisco and Bremerton.

Nor does it apply in this case from the date of the claimant's departure from the United States, January 6, 1900, as at that date neither of the acts granting the 10 per cent increase had been passed, but as the claimant did not return to the United States until after the act of March 2, 1901, he is entitled to the benefit of the 10 per cent increase under that act until his return to the United States, June 12, 1901.

The question as to the basis upon which the 10 per cent should be computed was considered in the case of Irwin (38 C. Cls., R., —), and we there held that the term "pay proper" included longevity pay, and upon that basis the claimant herein is entitled to have the 10 per cent increase computed.

25 And for the reasons stated in the former opinion, following the case of Chauncey Thomas (38 C. Cls., R., —), the claimant is entitled to travel pay from Barbados (where detached from the U. S. S. "Lancaster") to New York, a distance of 2,106 miles, at the rate of 7 cents per mile, under the army appropriation act, March 3, 1899 (30 Stat. L., 1064, 1068), providing that "hereafter the maximum to be

allowed and paid to any officer of the Army shall be seven cents per mile, distance to be computed over the shortest usual traveled routes, * * * Provided further, That actual expenses only shall be paid officers when traveling to or from our island possessions in the Atlantic and Pacific oceans."

As that act making an allowance for mileage is made applicable to naval officers by the enacting clause of section 13, aforesaid, the claimant is entitled to recover thereon, less the sum of $50 which was allowed him by the accounting officers as expenses, leaving due him the sum of ninety-seven dollars and forty-two cents ($97.42) on this item.

For the reasons given the motion for a new trial is allowed as to the 10 per cent increase for services rendered in the Asiatic waters, from May 26, 1900, to June 12, 1901, but for the reasons stated in the former opinion is overruled as to the sea pay claimed while traveling under the order of the Navy Department in a merchant vessel.

Order:

The former judgment is set aside and judgment is now entered on the findings heretofore filed in the sum of five hundred and sixty-eight dollars and twenty-nine cents ($568.29).

BY THE COURT.

VII. *Re-formed judgment of the court.*

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

At a Court of Claims held in the city of Washington, on the first day of June, A. D. 1903, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, Charles M. Thomas, do have and recover of and from the United States the sum of five hundred and sixty-eight dollars and twenty-nine cents ($568.29).

BY THE COURT.

26 VIII. *Application for and allowance of appeal.*

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

From the judgment rendered in the above-entitled cause on the first day of June, 1903, in favor of the claimant, the defendants, by their Attorney-General, on the 29th day of June, 1903, make application for, and give notice of, an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Asst. Attorney-General.

Filed June 29, 1903.

Order: Let the appeal be allowed.

C. C. NOTT,
Chief Justice.

July 2, 1903.

27 Court of Claims.

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

I, John Randolph, assistant clerk of the Court of Claims, certify that foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusions of law filed by the court, of the opinions of the court and the dissenting opinion, of the final judgment of the court of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 9th day of July, A. D. 1903.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

28 Court of Claims.

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

I, John Randolph, assistant clerk of the Court of Claims, certify that the annexed is a true transcript of the application of the claimant for and the allowance of an appeal from the judgment of this court in favor of the said claimant to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 20th day of July, A. D. 1903.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

29 In the Court of Claims.

CHARLES M. THOMAS
v.
THE UNITED STATES. } No. 22671.

The United States having appealed from the judgment rendered in favor of this claimant on the first day of June, in the year 1903, for the sum of five hundred and sixty-eight dollars and twenty-nine cents ($568.29), now comes the claimant, Charles M. Thomas, and hereby appeals to the Supreme Court of the United States from so much of said judgment as disallows the remainder of his claim, and hereby makes application for an allowance of this appeal.

(Signed) GEORGE A. & WILLIAM B. KING,
Attorneys for Claimants.

Filed July 13, 1903.
J. R.

Let the above appeal of the claimant be allowed.

(Signed) C. C. NOTT,
Chief Justice.

July 15, 1903.

(Indorsement on cover:) File No. 19025. Court of Claims. Term No. 374. The United States, appellant, vs. Charles M. Thomas; and File No. 19026. Term No. 375. Charles M. Thomas, appellant, vs. The United States. Filed July 28th, 1903.

O